

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JAMES VAN WINKLE,

Plaintiff,

V.

CHESTNUT RIDGE ASSOCIATES, LLC.,
ON THE PARK, INC., DELI MANAGEMENT,
INC. d/b/a JASON'S DELI, SPECIALTY
RETAILERS, INC. d/b/a PALAIS ROYAL,
OAKRIDGE RESTAURANT, LLC d/b/a
CILANTRO'S MEXICAN GRILL, and
BEST DONUTS,

Defendants.

CIVIL ACTION NO. 4:17-CV-01910
JURY

**ORIGINAL ANSWER AND AFFIRMATIVE DEFENSES OF
DELI MANAGEMENT, INC. d/b/a JASON'S DELI WITH JURY DEMAND**

Defendant, Deli Management, Inc. d/b/a Jason's Deli ("Jason's Deli), by and through its attorneys, hereby files its Answer and Affirmative Defenses to Plaintiff's Original Complaint (Dkt #1). In response to the numbered paragraphs of the Plaintiff's Complaint, Defendant answers as follows:

ANSWER

With respect to the introductory, unnumbered paragraph of the Complaint, Jason’s Deli admits Plaintiff James Van Winkle (“Plaintiff”) has filed a Complaint against it seeking injunctive relief and reasonable attorneys’ fees and costs pursuant to the Americans with Disabilities Act (42 U.S.C. § 12181 *et seq.* (“ADA”)) and the Americans with Disabilities Act Accessibility Guidelines (28 C.F.R. Part 36, App. D (“ADAAG”)), but denies that Plaintiff is entitled to any such relief. Except as expressly admitted, Jason’s Deli denies all remaining allegations in this paragraph.

JURISDICTION AND VENUE

1. To the extent paragraph 1 of the Complaint states a legal conclusion, no response is required. To the extent paragraph 1 contains factual allegations, Jason's Deli admits that the Plaintiff purports to invoke this Court's original jurisdiction under 42 U.S. C. § 12188 and 28 U.S.C. §§ 1331 and 1343, but denies subject matter jurisdiction, denies any violations of the ADA or the ADAAA, denies any wrongdoing and further denies that Plaintiff is entitled to any of the relief he seeks.

2. The allegations contained in paragraph 2 of the Complaint state legal conclusions and no response is required. Jason's Deli admits the real property is located in the Southern District of Texas and that venue is proper under 28 U.S.C. § 1391, but denies the remainder of the allegations contained in paragraph 2 of Plaintiff's Complaint.

PARTIES

3. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations made in paragraph 3 of Plaintiff's Complaint and denies the same.

4. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations made in paragraph 4 of Plaintiff's Complaint and denies the same.

5. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations made in paragraph 5 of Plaintiff's Complaint and denies the same.

6. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations made in paragraph 6 of Plaintiff's Complaint and denies the same.

7. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations made in paragraph 7 of Plaintiff's Complaint and denies the same.

8. Jason's Deli lacks knowledge or information sufficient to admit or deny the

allegations made in paragraph 8 of Plaintiff's Complaint and denies the same.

9. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations made in paragraph 9 of Plaintiff's Complaint and denies the same.

10. Jason's Deli admits the allegations contained in paragraph 10 of Plaintiff's Complaint.

11. Jason's Deli admits that it leases and operates a Jason's Deli location at 1275 Kingwood Drive, Kingwood, Texas 77339, but denies the remainder of the allegations contained in paragraph 11 of Plaintiff's Complaint.

12. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations made in paragraph 12 of Plaintiff's Complaint and denies the same.

13. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations made in paragraph 13 of Plaintiff's Complaint and denies the same.

14. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations made in paragraph 14 of Plaintiff's Complaint and denies the same.

15. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations made in paragraph 15 of Plaintiff's Complaint and denies the same.

16. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations made in paragraph 16 of Plaintiff's Complaint and denies the same.

17. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations made in paragraph 17 of Plaintiff's Complaint and denies the same.

GENERAL ALLEGATIONS

18. The allegations contained in paragraph 18 of the Complaint state legal conclusions, a response to which is not required. To the extent paragraph 18 contains factual

allegations, Jason's Deli admits that certain areas of the Subject Premises are open to the public but otherwise denies the allegations contained in paragraph 18.

19. The allegations contained in paragraph 19 of the Complaint state legal conclusions, a response to which is not required, and Jason's Deli therefore denies same.

20. The allegations contained in paragraph 20 of the Complaint state legal conclusions, a response to which is not required, and Jason's Deli therefore denies same.

21. The allegations contained in paragraph 21 of the Complaint state legal conclusions, a response to which is not required, and Jason's Deli therefore denies same.

22. The allegations contained in paragraph 22 of the Complaint state legal conclusions, a response to which is not required, and Jason's Deli therefore denies same.

23. Jason's Deli denies the allegations of paragraph 23 of the Complaint.

24. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations made in paragraph 24 of Plaintiff's Complaint and denies the same.

25. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations made in paragraph 25 of Plaintiff's Complaint and denies the same.

26. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations made in paragraph 26 of Plaintiff's Complaint and denies the same.

27. Jason's Deli denies Plaintiff was subjected to discrimination by Jason's Deli as alleged in Paragraph 27 of the Complaint. Jason's Deli lacks knowledge or information sufficient to admit or deny the remaining allegations made in Paragraph 27 of Plaintiff's Complaint and therefore denies the same.

28. Jason's Deli denies the allegations contained in paragraph 28 of Plaintiff's Complaint.

COUNT I – INJUNCTIVE RELIEF

29. The allegations contained in paragraph 29 of the Complaint state legal conclusions, a response to which is not required, and Jason's Deli therefore denies same.

30. The allegations contained in paragraph 30 of the Complaint state legal conclusions, a response to which is not required, and Jason's Deli therefore denies same.

31. Jason's Deli denies the allegations contained in paragraph 31 of Plaintiff's Complaint.

32. Jason's Deli denies the allegations contained in paragraph 32 of Plaintiff's Complaint.

33. Jason's Deli denies the allegations contained in paragraph 33 of Plaintiff's Complaint.

34. Jason's Deli denies the allegations contained in paragraph 34 of Plaintiff's Complaint.

35. Jason's Deli denies the allegations contained in paragraph 35 of Plaintiff's Complaint.

- a. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations contained in Paragraph 35(a) of Plaintiff's Complaint and denies the same.
- b. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations contained in Paragraph 35(b) of Plaintiff's Complaint and denies the same.
- c. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations contained in Paragraph 35(c) of Plaintiff's Complaint and denies the same.
- d. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations contained in Paragraph 35(d) of Plaintiff's Complaint and denies the same.

- e. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations contained in Paragraph 35(e) of Plaintiff's Complaint and denies the same.
- f. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations contained in Paragraph 35(f) of Plaintiff's Complaint and denies the same.
- g. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations contained in Paragraph 35(g) of Plaintiff's Complaint and denies the same.
- h. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations contained in Paragraph 35(h) of Plaintiff's Complaint and denies the same.
- i. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations contained in Paragraph 35(i) of Plaintiff's Complaint and denies the same.
- j. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations contained in Paragraph 35(j) of Plaintiff's Complaint and denies the same.
- k. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations contained in Paragraph 35(k) of Plaintiff's Complaint and denies the same.
- l. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations contained in Paragraph 35(l) of Plaintiff's Complaint and denies the same.
- m. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations contained in Paragraph 35(m) of Plaintiff's Complaint and denies the same.
- n. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations contained in Paragraph 35(n) of Plaintiff's Complaint and denies the same.
- o. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations contained in Paragraph 35(o) of Plaintiff's Complaint and denies the same.
- p. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations contained in Paragraph 35(p) of Plaintiff's Complaint and denies the

same.

- q. Jason's Deli denies the allegations contained in paragraph 35(q) of Plaintiff's Complaint.
- r. Jason's Deli denies the allegations contained in paragraph 35(r) of Plaintiff's Complaint.
- s. Jason's Deli denies the allegations contained in paragraph 35(s) of Plaintiff's Complaint.
- t. Jason's Deli denies the allegations contained in paragraph 35(t) of Plaintiff's Complaint.
- u. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations contained in Paragraph 35(u) of Plaintiff's Complaint and denies the same.
- v. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations contained in Paragraph 35(v) of Plaintiff's Complaint and denies the same.
- w. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations contained in Paragraph 35(w) of Plaintiff's Complaint and denies the same.
- x. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations contained in Paragraph 35(x) of Plaintiff's Complaint and denies the same.
- y. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations contained in Paragraph 35(y) of Plaintiff's Complaint and denies the same.
- z. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations contained in Paragraph 35(z) of Plaintiff's Complaint and denies the same.
- aa. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations contained in Paragraph 35(aa) of Plaintiff's Complaint and denies the same.
- bb. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations contained in Paragraph 35(bb) of Plaintiff's Complaint and denies the same.

- cc. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations contained in Paragraph 35(cc) of Plaintiff's Complaint and denies the same.
- dd. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations contained in Paragraph 35(dd) of Plaintiff's Complaint and denies the same.
- ee. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations contained in Paragraph 35(ee) of Plaintiff's Complaint and denies the same.
- ff. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations contained in Paragraph 35(ff) of Plaintiff's Complaint and denies the same.
- gg. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations contained in Paragraph 35(gg) of Plaintiff's Complaint and denies the same.
- hh. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations contained in Paragraph 35(hh) of Plaintiff's Complaint and denies the same.
- ii. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations contained in Paragraph 35(ii) of Plaintiff's Complaint and denies the same.
- jj. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations contained in Paragraph 35(jj) of Plaintiff's Complaint and denies the same.
- kk. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations contained in Paragraph 35(kk) of Plaintiff's Complaint and denies the same.
- ll. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations contained in Paragraph 35(ll) of Plaintiff's Complaint and denies the same.
- mm. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations contained in Paragraph 35(mm) of Plaintiff's Complaint and denies the same.
- nn. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations contained in Paragraph 35(nn) of Plaintiff's Complaint and denies the

same.

oo. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations contained in Paragraph 35(oo) of Plaintiff's Complaint and denies the same.

pp. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations contained in Paragraph 35(pp) of Plaintiff's Complaint and denies the same.

36. Jason's Deli denies the allegations contained in paragraph 36 of Plaintiff's Complaint.

37. Jason's Deli denies the allegations contained in paragraph 37 of Plaintiff's Complaint.

38. Jason's Deli denies the allegations contained in paragraph 38 of Plaintiff's Complaint.

39. Jason's Deli denies the allegations contained in paragraph 39 of Plaintiff's Complaint.

40. Jason's Deli denies the allegations contained in paragraph 40 of Plaintiff's Complaint.

41. Jason's Deli lacks knowledge or information sufficient to admit or deny the allegations regarding Plaintiff's retention of counsel and therefore denies the allegations contained in paragraph 41 of Plaintiff's Complaint.

42. The allegations contained in paragraph 42 is a procedural statement, a response to which is not required.

Responding to the unnumbered paragraph following the heading "WHEREFORE," does not require a response. To the extent a response is required, Jason's Deli denies that Plaintiff is entitled to any of the requested relief.

Any allegations not specifically admitted herein are denied.

AFFIRMATIVE DEFENSES

By pleading the following as affirmative defenses, Jason's Deli does not concede that each of the matters covered by the affirmative defenses must be proven by Jason's Deli, and Jason's Deli reserves the position that the Plaintiff retains the burden of proof on all matters necessary to state the claims asserted in the Plaintiff's Complaint and to establish any alleged damages. Without prejudice to its denials and other statements of its pleading, Jason's Deli alleges the following affirmative defenses:

FIRST AFFIRMATIVE DEFENSE

Plaintiff's Complaint, in whole or in part, fails to state a claim against Jason's Deli upon which relief may be granted to the extent that it fails to allege facts sufficient to support the claims asserted in conformance with the pleading standards set forth in *Ashcroft v. Iqbal*, 552 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

SECOND AFFIRMATIVE DEFENSE

Plaintiff's Complaint, including any purported claim for relief alleged in the Complaint, is barred to the extent that Plaintiff's claimed barriers or requested modifications of policies, procedures and/or practices are not necessary to Plaintiff's equal access to portions of property operated as a place of public accommodation by Jason's Deli.

THIRD AFFIRMATIVE DEFENSE

Plaintiff is not entitled to recover from Defendant on any claim for relief in this action because Jason's Deli has completely or substantially complied with all requirements applicable to it, and because Jason's Deli's acts or omissions, as alleged in the Complaint, to the extent Jason's Deli committed any acts or omissions, were done in good faith reliance on validly issued building

permits and a properly issued Certificate of Occupancy, pursuant to reasonable business justifications and do not constitute acts or omissions resulting in any discrimination against persons with disability or anyone else.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff's claims are moot to the extent he seeks alterations that have already been made or will have been made by the time this action is adjudicated.

FIFTH AFFIRMATIVE DEFENSE

The Plaintiff's Complaint should be dismissed in whole or in part on the ground and to the extent that the elements and features of the property in question were constructed and/or altered before the effective date of the ADA or any other statute requiring that its construction or alteration comply with the statutes, regulations and building standards cited by Plaintiff in the Complaint.

SIXTH AFFIRMATIVE DEFENSE

Plaintiff's claims for attorney's fees are barred, in whole or in part, because Plaintiff needlessly initiated legal action without providing notice of the alleged violations of law or alleged denial of access to or enjoyment of services, privileges, amenities, and/or accommodations offered by the Subject Premises, and without otherwise attempting to resolve any dispute Plaintiff may have with Jason's Deli. Further, Jason's Deli has attempted to contact Plaintiff's counsel numerous times through telephone calls and written communications after the filing of this action in an attempt to resolve the same without the necessity of incurring expense. (See Exhibit A attached.) However, counsel for the Plaintiff failed to respond.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred on the ground and to the extent that they are based on any violations of applicable building standards that are within conventional building industry tolerances.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiff has failed to mitigate his damages, if any, including mitigation of compensatory damages and of attorney's fees.

NINTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred on the ground and to the extent he seeks damages or relief that is not available under Title III of the ADA under which he sues.

TENTH AFFIRMATIVE DEFENSE

Plaintiff's prayer for injunctive relief against Jason's Deli is barred on the ground and to the extent that Jason's Deli does not have the legal ability or right to alter portions of the area outside of the Store itself.

ELEVENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred on the ground and to the extent that Plaintiff lacks standing because the Plaintiff has suffered no injury in fact, Plaintiff has suffered no real, immediate threat of future injury as required by applicable law, and Plaintiff does not have standing to seek injunctive relief regarding alleged barriers that are unrelated to and do not impact Plaintiff's alleged disability, to the extent Plaintiff suffered any injury in fact.

TWELFTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred on the ground and to the extent that any elements or features of the property on which barriers are claimed were modified, such modifications did not constitute

alterations within the meaning of the ADA and its implementing regulations, and to the extent it did, such alterations did not trigger the modifications sought by Plaintiff or the modifications sought were made to the maximum extent feasible but still left the barriers alleged by Plaintiff.

THIRTEENTH AFFIRMATIVE DEFENSE

Plaintiff is not entitled to recover on the claim for relief in this action because Jason's Deli has completely or substantially complied with all applicable requirements and/or because any violation of the law is *de minimis*, insubstantial and insufficient to sustain a claim for relief as stated.

FOURTEENTH AFFIRMATIVE DEFENSE

Plaintiff's claims in the Complaint are barred on the ground and to the extent that Jason's Deli provided, or Plaintiff received, equivalent facilitation that provides effective access to any feature or element at the property that does not strictly comply with the applicable design guidelines, if any.

FIFTEENTH AFFIRMATIVE DEFENSE

Plaintiff's claims for injunctive relief are barred because there is no real, immediate threat of future injury with respect to the barriers alleged in the Complaint.

SIXTEENTH AFFIRMATIVE DEFENSE

Jason's Deli reserves the right to amend its Answer and Affirmative Defenses as additional information is revealed during the course of discovery or otherwise.

WHEREFORE, Defendant, Deli Management, Inc. d/b/a Jason's Deli, having fully answered the complaint herein, demands that said complaint be dismissed and held for naught, that it recover its costs herein expended, and that it have any and all other relief to which it may appear entitled.

JURY DEMAND

Defendant, Deli Management, Inc. d/b/a Jason's Deli, demands a trial by jury on all issues so triable.

DATED: August 11, 2017

Respectfully submitted,

SHAW COWART, LLP

/s/ John P. Cowart

JOHN P. COWART

Texas Bar No. 04919500

JUSTIN W. FISHBACK

Texas Bar No. 24056736

1609 Shoal Creek Blvd., Ste. 100

Austin, TX 78701

(512) 499-8900 telephone

(512) 320-8906 facsimile

jcowart@shawcowart.com

jfishback@shawcowart.com

ATTORNEYS FOR DEFENDANT,
DELI MANAGEMENT, INC. d/b/a JASON'S DELI

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was electronically filed in compliance with Local Rule LR5 on August 11, 2017. Therefore, this document was served upon all counsel of record who are deemed to have consented to electronic service via the Court's CM/ECF system per Fed. R. Civ. P. 5(b)(2)(E). Pursuant to Fed. R. Civ. P. 5(b)(2), all other parties and counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing as follows on August 11, 2017:

Via CM/ECF System

Joshua H. Sheskin
Federal Disability Advocates
4300 Biscayne Boulevard, Suite 305
Miami, Florida 33137
jsheskin@jltrial.com

Attorneys for Plaintiff

/s/ John P. Cowart
JOHN P. COWART